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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KHOSROW LALEZARIAN et al., Plaintiffs and Respondents, v. STATE FARM INSURANCE COMPANY, Defendant and Appellant.	B269785 (Los Angeles County Super. Ct. No. SC106552)

APPEAL from an order of the Superior Court of Los Angeles County, Nancy L. Newman, Judge. Affirmed.

Pacific Law Partners, Clarke B. Holland and Brendan J. Fogarty; Murchison & Cumming and Jean M. Daly; Shaver, Korff & Kastranovo and Michael J. O'Neill for Defendant and Appellant.

Robert H. Roe for Plaintiffs and Respondents.

Appellant State Farm General Insurance Company appeals an order vacating an insurance appraisal award that valued the loss respondents Khosrow and Violet Lalezarian had sustained to their property during a rainstorm. The trial court concluded the appraisal panel exceeded its authority by making factual determinations whether certain construction costs the Lalezarians had included in their claim were necessary to repair damage caused by the storm. We affirm.

FACTUAL BACKGROUND

A. The Water Intrusion Event and Appraisal Demand

In 2008, Khosrow and Violet Lalezarian sustained water damage to their Beverly Hills residence during two rainstorms. The Lalezarians filed a claim with State Farm pursuant to their homeowners insurance policy. After inspecting the property, State Farm paid the Lalezarians approximately $215,000 in benefits, and informed them that it disagreed with a significant portion of their claimed loss. State Farm asserted that the disputed areas of coverage included, among other things, the extent of damage, if any, to the roof, an exterior second-story deck and several rooms in the house. State Farm subsequently conducted a second inspection, and provided an additional benefit payment of approximately $125,000.

In October 2009, the Lalezarians requested an appraisal to determine the value of their loss pursuant to Insurance Code section 2071. State Farm declined the request, contending that an appraisal was premature because the parties still had significant disagreements regarding the scope of the loss.

In January 2010, the Lalezarians filed a breach of contract action against State Farm, and moved for an order compelling an appraisal pursuant to section 2071. State Farm opposed the

motion, again contending that an appraisal was not appropriate due to the parties' ongoing dispute regarding the scope of the loss. The trial court agreed with State Farm, explaining that the Lalezarians' "request for an appraisal was improper" because the parties' unresolved coverage disputes might cause the appraisal panel to decide "questions as to the scope of coverage rather than just the amount of certain items." (*Lalezarian v. State Farm General Ins. Co.* (January 25, 2012, B228361) 2012 WL 206311, *2 [unpub. opn.] (*Lalezarian I*).) The Lalezarians appealed.

In January 2012, we reversed the trial court's order, concluding that the existence of unresolved coverage disputes did "not vitiate the Lalezarians' right to an appraisal to resolve their disagreement with State Farm regarding the value of their covered loss." (*Lalezarian I, supra,* 2012 WL 206311 at *4.) In our analysis, we acknowledged that "[t]he procedural complexities of an immediate appraisal proceeding that [had] troubled the trial court [we]re quite real." (*Id.* at *5.) We concluded, however, that the "court [had] . . . erred in attempting to avoid [those procedural complexities] by simply denying the motion to compel an appraisal. Instead, the court should have granted the motion and ordered the parties to participate in an appraisal proceeding, but stayed its order pursuant to Code of Civil Procedure section 1281.2 . . . until questions of coverage and scope of loss were resolved."[1] (*Ibid.*) We further explained that

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[1] Code of Civil Procedure section 1281.2 permits the trial court to stay an arbitration proceeding pending resolution of nonarbitrable issues. The provision has been interpreted to apply to appraisal proceedings. (See *Doan v. State Farm General Ins. Co.* (2011) 195 Cal.App.4th 1082, 1099 (*Doan*) [section 1281.2

"[t]he trial court's decision on those issues [could] then "'inform the appraisal when it goes forward.'" [Citation.]" (*Id*. at *6 [citing and quoting *Kirkwood v. California State Automobile Assn. Inter–Ins. Bureau* (2011) 193 Cal.App.4th 49, 57 (*Kirkwood*).)

B. The Appraisal

1. The stipulated appraisal order

Despite our instructions concerning the procedures to be followed on remand, the trial court and the parties elected to move forward with the appraisal before resolving their coverage disputes.

The parties negotiated a stipulated order setting forth the procedures that would govern the appraisal. The order directed that the panel should determine the amount of loss by making separate factual findings as to four issues: (1) "the reasonable and necessary cost to repair or replace all physical damage to the dwelling from the Loss with similar construction and for the same use" (cost of repair); (2) "the additional costs, if any, which would be incurred as a result of the enforcement of any building, zoning, or land use ordinance while repairing or rebuilding the physical damage to the dwelling from the Loss" (building ordinance costs); (3) the cost of mold abatement arising from the Loss (mold abatement costs); and (4) the amount of time necessary to restore the property.

After further proceedings and negotiations, the court amended the order to add several provisions related to the panel's determination of loss. The amendments directed that the

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authorizes trial court to stay insurance-appraisal proceedings "to permit the resolution of other issues"].)

panel's loss calculations should include: (1) "any consequential physical damage incurred in making the repair or replacement," and (2) "the cost of replacing all items in the damaged area so as to conform to a reasonably uniform appearance." The amendments also added language clarifying that the panel "lack[ed] authority to determine whether any of the damage claimed by plaintiffs as part of [the Loss] preexisted the date of [the Loss]. If the parties dispute whether any damage submitted for consideration by [the panel] preexisted the Loss, the panel shall determine the [value] of that portion of the Loss which any party contends preexisted the date of Loss, then list the disputed line item(s) separately in its Award, and leave determination of any causation issues to be resolved later at the trial of this lawsuit." Finally, the amended order precluded the panel from determining "any issues related to statutory construction, policy interpretation or coverage."

2. The appraisal hearing

State Farm selected Jeff Calkins to serve as its appraiser on the panel, and the Lalezarians selected Michael Nedobity to serve as their appraiser. Retired Superior Court Judge Joe Hilberman was selected to serve as the neutral umpire.

During the appraisal hearing, the Lalezarians claimed that they had expended approximately $1.1 million to repair damage caused by the rainstorms.[2] The Lalezarians each testified at the hearing, as did their structural engineer, Masoud Dejban, their contractor, Victor Robinett, and their public adjuster, Robert

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[2] The appraisal hearing was not transcribed; accordingly, the factual summary of what occurred is based on information set forth in declarations the parties submitted during the litigation of the motion to vacate the appraisal award.

Barton, who authenticated and presented copies of the repair estimates he had submitted to State Farm on behalf of the Lalezarians in support of their claim.

State Farm's witnesses testified that the true cost of repairing damage caused by the 2008 storms was approximately $250,000. State Farm's witnesses included Sam Tohme, an emergency water restoration contractor who had performed services at the Lalezarians' property, Barbary Connally, a State Farm claim representative who had inspected the premises after the storms, Bill Gansey, a professional contractor, and Lisa Shusto, a structural engineer.

At the conclusion of the hearing, Calkins and Hilberman signed an appraisal award finding $314,663 in repair costs, $343 in building ordinance costs and approximately $5,200 in mold abatement costs. The award made additional value findings for three categories of property that State Farm had contended were damaged prior to the water event: $25,467 for "all physical damage to the roof system"; $20,837 for "all physical damage to the deck"; and $1,570 for window damage.

C. The Motion to Vacate the Appraisal Award

1. The Lalezarians' motion to vacate

After the appraisal panel denied a request to modify its award, the Lalezarians filed a motion in the trial court seeking to vacate the award. The Lalezarians argued that the panel had exceeded its authority by making factual determinations whether certain construction costs included in their claimed scope of loss were necessary to repair damage caused by the storms, and by deciding whether various upgrades the Lalezarians had made to the property were in fact required under local building ordinances.

The Lalezarians asserted that they presented evidence to the appraisal panel demonstrating the scope of construction that had been performed to remedy the storm damage. The construction included, among other things, the replacement and reconfiguration of a second-floor deck that ran along the back of the home; a seismic retrofit of the exterior rear wall where the deck was located (allegedly required to comply with current building ordinances); a complete roof replacement; and replacement of all windows in the home.

The Lalezarians further asserted that State Farm's witnesses had testified that a substantial portion of the construction work performed at the house was not necessary to repair any damage from the storms, but instead "was related to preexisting water damage or the desire of the Lalezarians to remodel their home. State Farm argued that such damage was not covered by their policy and should therefore not be included in the appraisal panel's award."

The Lalezarians contended that, in response to these arguments, they requested that the appraisal panel evaluate the cost of the work they had actually performed on the house, and defer questions of causation, necessity and coverage until trial. State Farm, however, argued that the panel "had the power to omit from its award any repairs the panel believed were not required as a result of the 2008 losses but instead related to preexisting damage" or remodeling costs. State Farm further asserted that the panel was permitted to determine whether various upgrades the Lalezarians had made to the house, including seismic retrofitting and roofing alterations, were in fact required under local building ordinances.

According to the Lalezarians, the neutral umpire agreed with State Farm, and ruled that the panel "had authority to determine what damage at the Lalezarian home was in fact caused by the 2008 water losses. Damage not determined to be related to the 2008 water losses, in the panel's opinion, would be omitted from the appraisal award."

In support of their motion, the Lalezarians filed a declaration from their appraiser, Michael Nedobity, explaining what had occurred at the hearing. Nedobity confirmed that State Farm's witnesses had "argued that most of the repairs . . . were either related to water damage that . . . preexisted the 2008 insurance losses or were unrelated to any water damage and instead were done to simply remodel the home." Nedobity also confirmed that the umpire had "ruled that the panel had the authority to determine what damage to the Lalezarian home was in fact caused by the 2008 water losses," and would "omit" any damage that it did not believe to have been caused by the 2008 event.

Nedobity's declaration identified four categories of repairs that the Lalezarians had included in their scope of loss, but were omitted from the panel's award: (1) the roofing award excluded the costs of replacing or fireproofing the existing wood shingles; (2) the deck award excluded the costs of replacing the sliding doors and structural beams that extended into the framing of the residence; (3) the award did not provide any value for the seismic retrofit of the rear wall where the deck was located; and (4) the award did not provide any value for the replacement of windows throughout the home.

The Lalezarians' attorney at the appraisal hearing, Robert Roe, provided a second declaration confirming that State Farm

had argued that the appraisal panel had the authority to omit from its award "any repairs the panel believed were not required as a result of the 2008 losses," and to "determine whether or not certain local building codes mandated repairs to the . . . roof and other areas of plaintiffs' home." Roe further asserted that the umpire had accepted these arguments.

Public adjuster Robert Barton provided a declaration stating that he had prepared and submitted a repair claim to State Farm totaling almost $1.1 million. Barton's declaration included copies of the estimates he had received from the Lalezarians' contractor, which were submitted to State Farm and introduced as evidence at the appraisal hearing.

2. State Farm's opposition

In its opposition, State Farm argued that the evidence showed the appraisal panel had not made any findings regarding causation or coverage, but rather had made permissible determinations regarding the scope of repairs that was actually necessary to remedy damage from the rainstorms. State Farm contended that an insurer participating in an appraisal has a right to present evidence "show[ing] that the damage may be restored in a manner which does not involve upgrades, extensive demolition, or the extent of construction which the insured suggests. Issues such as the manner, scope and costs of repair are properly resolved in appraising the 'value of the loss' . . ."

State Farm also argued the evidence it presented at the appraisal hearing showed the scope of construction the Lalezarians had performed on their residence greatly exceeded that which was necessary to repair the water damage. State Farm's attorney, Craig Brunet, provided a declaration with several photographs of the residence taken before and after the

construction. At the appraisal hearing, the Lalezarians admitted the photographs accurately depicted the modifications they had made to their residence, which included a complete roof replacement; replacement of a wooden entryway staircase with a stone and iron staircase; extensive remodeling to the living room and other areas of the home; raising the floor height of a second-story bedroom; removing, replacing and restructuring the second-story deck; replacement of all windows at the property; vaulting several bedroom ceilings; and re-stuccoing the exterior. According to State Farm, Khosrow Lalezarian had admitted to the appraisal panel that "the work on the house involved more than simply repairing damage, but had been an extensive remodel."

State Farm's opposition further asserted that Lisa Shusto, a structural engineer, had testified that the "the scope of repair" set forth in State Farm's estimate was "both appropriate and adequate to address all damage from the two water damage events." Shusto explained that the storm-related damage to the second-story deck was only cosmetic in nature, and did not adversely affect any structural element of the home, or otherwise require any building ordinance upgrades or seismic retrofitting. Shusto also asserted that the extensive modifications the Lalezarians had made to the exterior deck and rear wall "were neither necessary nor warranted to repair damage from the losses." She made similar statements regarding the Lalezarians' decision to replace the roof, which Shusto claimed to have suffered only minor damage in the storm. According to Shusto,

the Lalezarians' "post-loss alterations grossly exceed[ed] that necessary to address water damage to the residence."[3]

3. The trial court's order vacating the appraisal award

After a hearing, the trial court issued an order vacating the appraisal award. The court concluded that the parties' evidence demonstrated the panel had "made findings as to causation (i.e. whether losses were attributable to pre-existing damages or constituted remodeling [not required code upgrades] rather than repair costs. . . ." The court further concluded that the evidence showed the panel had "determined issues of law by determining the application of local building codes to certain claimed repairs."

The court also addressed State Farm's concern that if the appraisal panel was precluded from making factual determinations regarding "what was [actually] damaged or what [wa]s required to repair [the damage]," the panel would "end[] up appraising a remodeling project rather than the actual loss at issue.' [Citation.]'" The court explained that the "solution" to this issue was for the panel "to determine the cost or value of all claimed losses and list disputed losses separately in the appraisal award so that the issue of coverage for those items could be determined at trial." The court further directed that, due to the "fast-approaching trial date and advanced age of th[e] action," it would not send the matter "back for a new appraisal hearing." Instead, "all issues [would] be determined at trial."

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[3] State Farm provided a declaration from Shusto summarizing her testimony at the appraisal hearing. We provide a more detailed description of her testimony in our legal analysis below.

DISCUSSION

State Farm contends the trial court erred in concluding the appraisal panel exceeded its authority by deciding issues related to causation and policy coverage. According to State Farm, the record shows the panel acted appropriately by determining what repairs were actually necessary to address the storm water damage, and then setting a value on those repairs.

A. Summary of Applicable Law

1. Summary of law governing insurance appraisals

California law requires that all fire policies issued in the state "include an appraisal provision as set forth in Insurance Code section 2071. [Citations.] Under the statutorily-mandated appraisal provision, the parties are required to participate in an informal appraisal proceeding in the event there is a disagreement about the actual cash value or the amount of the loss and the insurer or insured makes a written request for an appraisal."[4] (*Lee v. California Capital Ins. Co.* (2015) 237 Cal.App.4th 1154, 1167 (*Lee*).)

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[4] The appraisal provision in section 2071 states, in relevant part: "In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written request of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of the request. Where the request is accepted, the appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon the umpire, then, on request of the insured or this company, the umpire shall be selected by a judge of a court of record in the state in which the property covered is located. . . . The appraisers shall . . . appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their

"An appraisal provision in an insurance policy constitutes an agreement for contractual arbitration" (*Doan, supra,* 195 Cal.App.4th at p. 1093 [citing Code of Civ. Proc., § 1280, subd. (a)]), and "thus is . . . subject to the statutory contractual arbitration law." (*Kirkwood, supra,* 193 Cal.App.4th at p. 57.) The appraisers' powers, however, are "far more limited" than those of an arbitrator. (*Doan, supra*, 195 Cal.App.4th at p. 1094.) "An arbitrator typically exercises '"essentially judicial functions,"' including deciding issues of law, and often resolves the entire dispute between the parties. [Citation.] By contrast, 'an appraiser has authority to determine only a question of fact, namely the actual cash value or amount of loss of a given item.' [Citation.] '"The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration. It is certainly not their function to resolve questions of coverage and interpret provisions of the policy."' [Citation.]" (*Lee*, *supra*, 237 Cal.App.4th at p. 1166; see also *Kirkwood, supra*, 193 Cal.App.4th at p. 59 ["[u]nder section 2071, an appraiser has authority to determine only a question of fact, namely the actual cash value or amount of loss of a given item"].) '"Matters of statutory construction, contract interpretation and policy coverage are not encompassed within the ambit of a section 2071 appraisal.' [Citation.]" (*Doan, supra*, 195 Cal.App.4th at p. 1094.)

The limited nature of appraisal imposes constraints on appraisal awards. When a specific item is subject to a dispute regarding coverage or causation, an award may value the loss to

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differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. . . ."

the item, provided that value is segregated so as to permit an adjustment to the award's determination of the total loss upon resolution of the dispute. (See *Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange* (2008) 162 Cal.App.4th 1498, 1502- 1507 (*Devonwood*).) This form of "itemization [allows] an appraisal panel to fulfill its obligation to assign loss values to damaged items without exceeding its authority by deciding issues that bear upon causation, coverage, or policy interpretation. The parties are free to dispute the insurer's liability to pay for disputed categories of loss in subsequent litigation." (*Lee*, *supra*, 237 Cal.App.4th at p. 1169.)

"We review the trial court's ruling on a challenge to an appraisal award under a de novo standard, drawing every reasonable inference to support the award. [Citation.] To the extent the court's ruling rests on issues of disputed fact, however, we apply the substantial evidence test. [Citation.]" (*Kacha v. Allstate Ins. Co.* (2006) 140 Cal.App.4th 1023, 1031 (*Kacha*.)

2. Summary of relevant case law

Several prior decisions have addressed the limits of an appraisal panel's authority. To aid our analysis, we briefly summarize three of those cases.

a. Safeco Ins. Co. v. Sharma

In *Safeco Insurance Co. v. Sharma* (1984) 160 Cal.App.3d 1060 (*Sharma*), the insured filed a claim for a piece of artwork that was stolen in a home burglary. The insured claimed the stolen artwork consisted of a "matched set" of 18th century "Bundi School" prints, which were substantially more valuable than an "unmatched" set of such prints. At an appraisal hearing, an expert witness testified that only about ten sets of matched

Bundi School prints were known to exist, and all of them were either in "'museums'" or in "'very well-known private collections.'" (*Id*. at p. 1064.) The appraisal panel concluded the insured's artwork was of average quality, and valued it in line with an unmatched set.

The appellate court concluded the panel had exceeded its authority by determining the "identity" of the item that was claimed to have been lost, rather than merely determining the value of what the insured had claimed was lost. (*Sharma, supra,* 160 Cal.App.3d at p. 1066.) The court explained that an appraisal panel's sole duty is to "determin[e] . . . 'the amount of damage resulting to various items submitted for their consideration.' . . . . [¶]. . . . [It] is not empowered to determine whether an insured lost what he claimed to have lost or something different. [¶] . . . . Certainly, an insurer is free to litigate whether the insured has misrepresented what he lost but it is beyond the scope of an appraisal. . . . [T]he question of *identity* of the property [should not be confused] with . . . questions relating to value, e.g., *quality* or *condition*." (*Id*. at pp. 1065-1066 [emphasis in original].)

b. Kacha v. Allstate Insurance

In *Kacha, supra,* 140 Cal.App.4th 1023, the trial court granted a motion to compel an appraisal of damage the insured had sustained to his property during a wildfire. Prior to the appraisal, the parties negotiated an appraisal award form that listed numerous items the insured claimed to have been damaged in the fire. "For each item, the form provided: 'Damage, if any, to the [e.g., kitchen cabinets] attributable to the fire. . . .'" (*Id*. at p. 1027.)

At the appraisal, the insurer argued that certain items the insured had included in his claim were not damaged in the fire, and urged the panel to award nothing for those items. The insured, however, argued that the panel was not authorized to determine issues of causation, and should "'establish a value based upon the damage to the premises, not based upon arguments by [the insurer] regarding blame, responsibility and speculative theories on the cause of loss." (*Kacha, supra,* 140 Cal.App.4th at p. 1027.) The panel returned an award that assigned no value to numerous items listed in the award form. The trial court confirmed the award.

On appeal, the insured argued the panel's decision to award no value for several items that were claimed to have been damaged in the fire demonstrated that it had exceeded its authority by making coverage determinations, rather than value determinations. The insurer, however, argued there was "no evidence" the panel had actually decided whether the fire caused damage to any of the items that were assigned no value. (*Kacha, supra,* 140 Cal.App.4th at p. 1035.) Rather, according to the insurer, the panel had awarded no value for those items "simply because it found [they] had no damage." (*Ibid*.)

The appellate court rejected this argument, explaining that the panel's award assigned no value for certain items the insurer had acknowledged to have "suffered damage from some source." (*Kacha, supra,* 140 Cal.App.4th at p. 1035.) The court noted, for example, that the insurer had not disputed the front door and back deck of the residence exhibited certain defects, but had argued that the fire did not cause those conditions. The court concluded such evidence demonstrated the panel's decision not to award any value for some of the claimed items was in fact a

determination that the fire had not caused the damage. The court further concluded that because it was "apparent the panel had made at least some coverage determinations, thereby exceeding its authority," the court was not required to "conduct a similar analysis for other items." (*Id* at p. 1036.)

c. Lee v. California Capital Ins. Co.

In Lee v. California Capital Ins. Co., supra, 237 Cal.App.4th 1154, the insured filed a claim seeking $800,000 for fire damage at her apartment building. The insured alleged smoke from the fire had completely destroyed five units in the building, and caused substantial damage to a sixth unit. The insurer, however, claimed that the fire had only damaged one unit, and valued the loss at approximately $70,000.

The insured filed a motion to compel an appraisal of the loss. The insurer opposed, arguing that the court could not compel an appraisal of items the insurer did not believe to have been damaged. The trial court granted the motion with an order directing the panel to separately appraise two categories of items: (1) items that the parties agreed had been damaged in the fire; and (2) items that the insured believed to have been damaged in the fire, but the insurer did not. The order further directed that the parties would resolve disputes regarding coverage and causation after the appraisal was completed.

At the appraisal hearing, the insurer argued that the insured's proposed scope of loss included items that "demonstrably did not ever exist at the property, including extra windows in all the rooms." (*Lee, supra,* 237 Cal.App.4th at p. 1162.) The insured, however, "took the position that the panel was obligated to appraise the scope of loss presented by the insured, even if it was apparent to the panel that the scope was

incorrect in matters such as square footage and the number of stories that a building contained." (*Id*. at pp. 1162-1163.)

The panel issued an award that provided separate valuations for the insurer's proposed scope of loss (approximately $200,000), and the insured's proposed scope of loss (approximately $800,000). The award included language clarifying that the panel had made no determination of coverage for any of the claimed items, including whether "items claimed were in fact damaged/destroyed by the fire . . . and whether the items claimed existed." (*Lee, supra,* 237 Cal.App.4th at p. 1663.)

The insurer filed a motion to vacate the order, asserting the panel had exceeded its authority by valuing a "theoretical loss" that included items that were not damaged, or had never existed. The trial court denied the motion, concluding the panel had no authority "to decide whether particular items were actually damaged in the fire or replaceable under the policy, or even whether they existed at the time of the fire. . . . '[T]hose are matters as to which the parties preserve a right to trial by jury[.]'" (*Lee, supra,* 237 Cal.App.4th at p. 1164.)

On appeal, the insurer argued the trial court erred when it compelled the appraisal panel to value "disputed items." (*Lee, supra,* 237 Cal.App.4th at p. 1169.) The appellate court rejected the insurer's assertion that an appraisal panel is categorically precluded from appraising items over which there is a dispute as to coverage. It agreed, however, that the trial court had erred by requiring the appraisal panel to "value all items of loss claimed by [the insured] to have been damaged in the fire, regardless of whether those items actually suffered damage or ever existed." (*Id*. at p. 1171.) As stated by the court: "[A] trial court does not necessarily err in compelling appraisal of disputed items when

the disputes turn on issues such as coverage, causation or policy interpretation. Those legal issues can be resolved in subsequent litigation, although it may be appropriate in certain cases to stay an appraisal pending resolution of the disputed issues. However, when the disputes turn on the condition or quality of damaged or destroyed items – and it is possible for the panel to assess an item's condition or quality without simply having to rely on the insured's representation – it is error to compel the appraisal panel to assign values to items that inspection reveals were not damaged or did not ever exist." (*Id*. at p. 1169.)

In its analysis, the court explained that "[a]n assessment of whether an item is damaged or existed is fundamental to a valuation of the amount of the loss. . . . If an item is undamaged, there is no repair cost and no need to replace it. . . . ' [Citation.]. . . . Clearly, a determination that a component part of a building is undamaged is an assessment regarding its condition. Similarly, a determination that a claimed item of loss did not exist in the manner claimed by the insured bears upon the valuation of the loss. For example, if an insured claims that damaged counters are made of granite but a simple visual examination reveals they consist of a much less expensive material, the panel is not compelled to assign a value for repairing or replacing granite countertops simply because the insured lists them on the items of loss submitted for the panel's consideration." (*Lee, supra,* 237 Cal.App.4th at pp. 1171-1172.)

The court distinguished *Sharma* and *Kacha*. In the court's view, *Sharma* merely precluded an appraisal panel from making "factual determination[s] as to the identity of [the lost] . . . property"; it did not preclude factual determinations regarding the "the damaged property's quality and condition after the loss."

(*Lee, supra,* 237 Cal.App.4th at p. 1172.) The court clarified that when "the pre-loss condition of the property is relevant and there is a dispute over the condition of the property prior to the loss, the panel may place more than one value on the loss. . . . But in the typical situation involving fire damage, where the quality or condition of the property is readily ascertainable and there is no dispute concerning its pre-loss condition, an appraisal panel is not compelled . . . to assign values to nonexistent or incorrectly described items of loss simply because they are claimed by the insured." (*Ibid.)*

The court explained that the issue addressed in *Kacha* was whether an appraisal panel can assign a "value of zero to a damaged item based on a determination that the damage is not covered by the insurance policy"; the case did not address whether a panel can "award[] nothing for items that are not damaged or never existed, where the nature or existence of the item is readily ascertainable." (*Lee, supra,* 237 Cal.App.4th at p. 1173.) According to the court, "[t]he *existence* of damage to an item as well as the *nature* of the claimed item are factors that directly bear upon the valuation of the loss, including the cost to repair or replace the item. By contrast, the *cause* of any damage does not bear upon the amount that may be required to repair or replace the item, although it may be appropriate to include different amounts for the same items of loss when the condition of the property prior to the loss is disputed and relevant to the valuation." (*Ibid*.)

3. Substantial evidence supports the trial court's finding that the appraisal panel exceeded its authority

In this case, the trial court concluded the appraisal panel exceeded its authority by making factual determinations whether

certain construction the Lalezarians performed at their home was necessary to repair water damage that resulted from the storms. We agree that, at least for some portion of the construction work, the evidence shows the panel did resolve issues that bear upon causation and coverage, and therefore exceeded its authority.

As summarized in our discussion of the facts, the Lalezarians' proposed scope of loss included, among other things, a total roof replacement and the demolition and reinstallation of a second-floor deck. They further alleged that the deck work required structural alterations to the framing of their house, and a seismic retrofit of the rear wall where the deck was located. According to the Lalezarians, these modifications were necessary to either repair damage incurred in the storm, or to comply with local housing ordinances that had been triggered by those repairs.

State Farm witness Lisa Shusto disagreed, testifying that the storm damage and local building ordinances did not necessitate the extensive work the Lalezarians had performed on the roof and deck. Regarding the deck, Shusto asserted that although "water intrusion reportedly occurred [during the rainstorm] at some locations along the rear wall of the residence where th[e] . . . deck meets with the main structure," she had not observed any damage on the deck that would have caused water to intrude into the "deck framing or main residence due to [the storm] precipitation." She also did not believe that the storm had caused any damage to the "deck structural framing" or to the "main residence . . . framing." She asserted that even if water intrusion had occurred in these areas, the "isolated wetting" from the storms would not require any of the "structural degradation" repair work the Lalezarians had included in their claim, and that

any such "structural damage to the deck framing and/or main residence . . . would be the result of long term . . . , repeated exposure to excessive moisture." Shusto also opined that while the extent of the modifications the Lalezarians chose to make to the deck "may have triggered code upgrade requirements for portions of the structure," the "modifications . . . were not necessary or warranted by possible water intrusion associated with the two rainstorms."

Shusto provided similar opinions regarding the Lalezarians' roof repairs. Although Shusto acknowledged the storms had dislodged some of the existing shingles and caused "staining on the flat [portions of the] roof," she asserted that neither of these conditions would have caused any damage to the roof's "framing or sheathing," and would not "result in water intrusion." She further asserted that any damage to the framing or sheathing the Lalezarians discovered during their "re-roofing efforts . . . would be the result of long-term repeated exposure to the moisture." Regarding the wood shingling, Shusto further claimed that the "wood shake roof was deteriorated . . . at the time of the storm," and that the "building paper" underneath the shingles "appeared to be deteriorated, indicating it had been unprotected for a period of time and the condition predates the subject storm events."

According to declarations from the Lalezarians' appraiser and attorney, after Shusto completed her testimony, State Farm argued to the panel that it had authority to exclude any repairs that related to damage preexisting the 2008 rain storms, and also to determine whether building ordinances mandated the repairs to the roof and other areas of the home the Lalezarians had included in their claim. The declarations further assert that the

umpire agreed the panel had authority to make these determinations, and would in fact omit damage that it found to have predated the loss. State Farm has presented no evidence contradicting these descriptions of the umpire's rulings.

The declaration of the Lalezarians' appraiser also asserts that the amounts the panel awarded for the roof and deck damage—approximately $25,000 and $20,000 respectively—excluded a substantial amount of repair costs the Lalezarians had sought in their claim, including the costs of re-shingling the roof, structural changes to the deck and seismically retrofitting the wall where the deck was located.[5]

Shusto's opinion testimony regarding the extent and cause of the roof and deck damage, considered in conjunction with the umpire's rulings and the amount of the award, support the trial court's finding that the panel did make factual determinations related to causation, at least with respect to the roof and deck. Specifically, the evidence indicates the panel concluded that a substantial portion of the repairs the Lalezarians made to the roof and deck was not necessary to remedy any damage caused by the 2008 storms, but rather had remedied preexisting damage.

State Farm, however, argues that under the holding in *Lee, supra,* 237 Cal.App.4th 1154, an appraisal panel is permitted to determine the scope of damage that an item actually sustained from the loss event, and to decide the appropriate method of repair. State Farm further contends that, in this case, the record shows the appraisal panel acted in accordance with *Lee* by first

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[5] The portion of the panel's award relating to the roof and deck costs was subject to State Farm's claim that none of the damage to those areas of the home resulted from the 2008 storms, an issue that was to be decided at trial.

assessing what damage the roof and deck actually suffered, and then placing a value on the repairs necessary to remedy that damage.

Lee does not compel State Farm's conclusion. *Lee* held that a trial court cannot compel an appraisal panel to "value all items of loss claimed by [the insured]. . . , regardless of whether those items actually suffered damage or ever existed." (*Lee, supra,* 237 Cal.App.4th at p. 1171.) As stated by the court, "[i]f inspection reveals that an item is undamaged or never existed, the panel should not apply a loss value to the item." (*Id*. at p. 1175.) Moreover, *Lee* specifically contemplated that when the "the pre-loss condition of the property is disputed and relevant to valuation" (*id*. at p. 1175, fn. 2), the panel should not resolve that dispute, but rather assign separate valuations of each parties' claimed scope of loss, and explain what "assumptions" each value is based on. (*Id*. at p. 1173.)

In this case, there was no dispute as to "the existence" of any item the Lalezarians included in their claim, nor was there any dispute that the roof and deck had in fact sustained some level of damage from some cause. Shusto acknowledged as much in her testimony. The parties disputed, however, whether some portion of the roof and deck damage pre-dated the rainstorms, whether the scope of work the Lalezarians had performed was necessary to repair damage incurred in the storm rather than pre-existing damage, and whether the necessary repairs triggered building code upgrades. Thus, unlike in *Lee*, it is clear that the "pre-loss condition" of the Lalezarians' property was both disputed, and relevant to the issue of valuation. Moreover, the Lalezarians' evidence indicates that the umpire specifically ruled the panel was permitted to omit the cost of any repairs it found

attributable to pre-existing damage. No such ruling occurred in *Lee*.[6]

The facts presented here are more comparable to *Kacha*. As explained above, the parties in that case presented conflicting theories as to whether certain items had been damaged in a wildfire, or whether the damage pre-existed the fire. The court concluded that by awarding no value for some of those items, the appraisal panel had effectively made a determination as to causation. Similarly, in this case, State Farm and the Lalezarians disagreed as to whether the rainstorms had caused all of the claimed damage to the roof and deck, or whether some portion of the damage was caused by a prior event. Although the appraisal panel did award some value for the roof and deck, the Nedobity declaration nonetheless indicates the award excluded a

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6 Under *Lee*, the panel was authorized to exclude from its award any construction costs the Lalezarians had expended on areas of the home that were not shown to have sustained any damage. For example, State Farm presented evidence that the Lalezarians' claim included the costs of remodeling their entryway staircase and vaulting the ceilings. If the Lalezarians failed to present any evidence showing that the staircase or ceilings were actually damaged, the panel was not required to value the costs of those modifications merely because the Lalezarians included them in their claim. As explained above, however, the evidence does show the panel made inappropriate causation and coverage determinations regarding some aspects of the Lalezarians' claim, including the roof and deck repairs, and therefore exceeded its authority regardless of whether it made similar errors related to other aspects of the claim. (See *Kacha, supra,* 140 Cal.App.4th at p. 1036 [where the evidence showed the panel had exceeded its authority by making improper "coverage determinations" regarding some claimed items, the court need not "conduct a similar analysis for other items"].)

large portion of the costs the Lalezarians had claimed were necessary to repair those areas of the home. As in *Kacha*, the parties' conflicting arguments regarding the origin of the roof and deck damage, combined with the amount that the appraisal panel ultimately awarded, indicate that the panel omitted values for damage to the roof and deck that it believed to have been caused by something other than the rainstorms. Such conduct exceeded the authority that section 2071 affords to appraisers.[7]

As we noted in our prior decision, when a party to an insurance contract seeks an appraisal prior to the resolution of coverage disputes, Code of Civil Procedure section 1281.2 provides trial courts a mechanism to avoid the risk that the appraisal will result in the type of errors that occurred in this case. Utilizing that statute, the trial court could have stayed the Lalezarians' appraisal until all issues involving causation, coverage and the actual scope of the loss had been resolved through a trial. The appraisal panel could have then determined a valuation based on those findings. Unfortunately, the trial

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[7] State Farm also argues that the Lalezarians are equitably estopped from challenging the appraisal panel's award because they agreed to the procedures and award form that would be used in those proceedings. As stated in its brief, "when a party's own conduct induces the commission of error, that party is estopped from asserting the error as a ground for reversal." The record, however, shows that the Lalezarians specifically argued to the umpire that the panel had no authority to determine what portion of the property damage was caused by the rainstorm, or to omit the costs of repairing damage the panel believed to have pre-existed the rainstorms. Moreover, the stipulated order governing the appraisal included language prohibiting the panel from determining issues of damage causation or coverage.

court did not do so, and the question of valuation must now be relitigated at trial.[8]

DISPOSITION

The order is affirmed. The respondents shall recover their costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.

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[8] Neither party has challenged the portion of the trial court's decision directing that it would not remand the matter for further appraisal proceedings, and that all issues related to valuation would be decided at trial. Thus, both parties appear to agree that if the appraisal panel did in fact exceed its authority, which we conclude it did, the entire case, including all issues related to the valuation of the Lalezarians' loss, should proceed to trial.